Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of GroupMe, Inc./ Skype Communications S.A.R.L, Petition For Expedited Declaratory Ruling	CG Docket No. 02-278

REPLY COMMENTS OF ROBERT BIGGERSTAFF

A frequent theme in the comments supporting the Petition has been a tendency to confuse the floor with the ceiling.

The TCPA broadly addresses several specific practices under the subsection titled "Restrictions on use of automated telephone equipment." Within the statute, Congress directly prohibited certain acts using such "automated telephone equipment." Congress defined some, but not all, devices that fall within that term. While Congress directly prohibited some acts, it also empowered the Commission to enact rules to further the goals of the statute. Congress provided a private right of action both for violations of the statute, and any violations of the Commission's attendant regulations.

The "floor" in this case is one that the statute places beneath, not above, the Commission. The Commission is not authorized to permit what the statute unambiguously prohibits. Under the guise of interpretation, the Commission is not

authorized to declare an exemption for a device that unambiguously meets even the most limited interpretation of the definition of "automatic telephone dialing system" ("ATDS") in the statute.

The converse, however, is not true. The definition of ATDS in the TCPA does not impose a ceiling preventing the FCC from reaching any "automated telephone equipment" either through expansive reading of existing definitions, or by directly subjecting new "automated telephone equipment" technologies to the TCPA under the Commission's authority directly provided for in subsection 227(b).

The use of the Commission's authority to develop the contours of the scope of the TCPA is well known. For example, in 1995 the Commission adopted an unstated exception to the prohibition on the use of "automated telephone equipment" (fax machines) when the sender had an "established business relationship" ("EBR") with the recipient. Such an provision was not present in the definition of "telephone facsimile machine" or "unsolicited advertisement" and legislative history suggested that specific provision was intentionally removed from the bill before passage. Nevertheless, that exception adopted by the FCC was ultimately upheld. CE *Design Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443 (7th Cir. 2010).

Such agency interpretations are the appropriate authority "which courts and litigants may properly resort for guidance." *Olmstead v. L. C.*, 527 U.S. 581, 583 (2000). They are the authoritative and unifying source for the TCPA's application. The principal rationale underlying this principle "is that in this context the agency acts as a congressional proxy; Congress develops the statutory framework and

directs the agency to flesh out the operational details." *Atchison, Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 441-42 (7th Cir. 1994), *aff'd* 516 U.S.152 (1996).

The ability of the Commission to interpret a statute and to adopt such constructions is particularly appropriate in areas of evolving technology. This truism has been demonstrated many times in the Commission's administration of the TCPA:

- Fax servers and personal computers that can receive faxes are a "telephone facsimile machine."
- Predictive dialers are an ATDS.
- Safe harbor for calls to numbers ported to cell phones. (47 C.F.R. § 64.1200(a)(1)(iv))
- Requirement for an opt-out notice on permission-based fax advertisements.
- Identification requirement that the identification in prerecorded messages "must be the name under which the entity is registered to conduct business." 64.1200(b)(1).
- Declaring a call made to ask for permission to make a subsequent solicitation, is itself a solicitation 10 FCC Rcd 12391, 12408, ¶15 (1995).
- A call that uses time from a "bucket" of minutes (or bytes, or messages) is a call for which the recipient is "charged."

None of these interpretations are found in the plain text of the TCPA itself. Absent the Commission's interpretations, none of these provisions would have been apparent to a construing court.

The current Commission language is adequate

The Commission's current construction of ATDS squarely fits gravamen of the

original target of this portion of the TCPA—automated devices that make calls without meaningful human intervention required to dial each individual call. That is still a good—and practical—application of the Commission's interpretive authority.

Comments of the Cargo Airline Association

The Cargo Airline Association ("CAA") supports the GroupMe Petition but it's alleged predicament is a false one. The carrier's solution is to get reliable information from the shipper of the package regarding actual consent of the recipient to be sent text messages because the sender is the one who has a direct relationship with the recipient and the ability to obtain express consent for such messages. However, the Commission should not go to the extreme suggested by CAA that the mere "provision of a package recipient's wireless telephone number by a package sender should establish prior express consent for shipping companies to send notifications *related to* that package."[1] First, many companies require a phone number as a condition of doing business—particularly when ordering from a catalog or the Internet.[2] Consent for subsequent text messages, prerecorded messages, or other automated calls can not be extracted as a condition of doing business. The paradigm suggested by CAA will inevitably be construed to permit later solicitations of products "related" to the package, or to ask you to participate in a "survey" about the product, etc. If you purchase an iPhone and have that "package" shipped to you,

[1] Comments of CAA at 3.

[2] This is ostensibly for the purposes of contact if there is a "problem" with an order.

then a solicitation message will follow for an "accessory" or "extended warranty" for that "package."

If the Commission accepts the invitation to create such a carve-out, it should be strictly limited the context of "shipping companies [sending] notifications *directly* related to *the tracking and delivery of* that package." It bears noting, however, that the Commission's authority (47 U.S.C. § 227(b)(2)C) is strictly limited in creating such carve-outs, to calls "that are not charged to the called party."[3] I, like many cell phone users, pay for each text message sent to me, so such a carve-out could not, as a matter of law, apply to such messages sent to many cell phones. Therefore the proper way to address shipment-related messages is through recognition that the message is on behalf of the shipper, and the shipper is responsible for actually obtaining express consent for such messages.

Comments of Communication Innovators

My opening comments on the GroupMe Petition cautioned the unintended consequences of any changes to the Commission's commentary on ATDS, and that others would exploit such a change widely beyond the text messaging context discussed in the GroupMe petition. This is now amply illustrated by the comments

[3] The Commission has exempted ATDS text messages from a carrier to its customers when the customer is not charged. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd 8752 ¶ 43 (1992). However, this exemption has already been abused. In *Emanuel v. NFL Enters., Inc.*, No 11-cv-1781 (S.D. Cal.) the complaint alleges NFL sent unsolicited advertising text messages to cell phones using an ATDS. Verizon intervened as a defendant, and declared that it sent those commercial solicitations to its own customers. The scheme allows advertisers like the NFL to skirt the TCPA's prohibition by exploiting the Commission guidance regarding text messages from a carrier to its customer. That exemption was intended to apply to messages regarding the service, Verizon is clearly abusing that exception.

of Communication Innovators, who demonstrate their specific intent to piggyback the GroupMe context of text messages, to bootstrap a wholesale exemption for predictive dialers. If that were to happen, my cell phone minutes would be quickly drained, the text messages I pay to receive would multiply, and my cell phone would have to, ultimately, be turned off and used only for outgoing calls.

Comments of Twilio

Twilio asks for something the Commission can not give. Twilio suggest alternative language in the for the Commission's regulation at 47 C.F.R. § 64.1200(f)(2).[4] However, the existing language is taken directly from the statute. If the Commission changes that language in the Commission's regulations as Twilio suggests, it will not exculpate Twilio's messages from the TCPA, because those messages would still violate the *statute*, even if they do not violate the Commission's *regulation.*

Twilio proposes that intermediaries should not be liable for messages they carry that were "sent" by a user. What Twilio fails to acknowledge is the ease that text message platforms can be abused by those "users." A blanket exemption is unwise, just as a blanket exemption was unwise for fax broadcasters but it is even a worse proposition with text broadcasters because of the ease of abuse of such systems. These concerns were expressed more fully in the *Reply Comments of Robert Biggerstaff on the Petition of Club Texting Inc.*, filed in this docket on Dec. 7, 2009. Text message broadcasters certainly deserve no ***less*** liability that fax

[4] Comments of Twillo at 14.

broadcasters, and the ease of exploitation of text broadcasting platforms militates strongly in favor of even greater application of vicarious liability to text broadcasters.

Reply Comments of Portfolio Recovery Associates, LLC

PRA claims that "It simply is not true that debt collectors (and other businesses) have no incentive to correct and remove wrong numbers from predictive dialers." On its face, this seems plausible. In practice, however, it fails miserably. Debt collectors are well know for employing varying methods of skip tracing, such as loading up a dialer with all the phone numbers of people wit the same last name in a geographical radius around the last known address of a debtor they can't contact. They hound relatives looking for debtors. And my personal experience in receiving numerous wrong-number debt collection calls, is that they refuse to believe you when you tell them they have a wrong number. In many instances, they demand I give them my name, social security number, and address to "make sure I'm not lying" or "to check to see if I owe money to someone else." In other cases, they would not change or delete my telephone number from their records unless I could provide the SSN of the debtor to prove I had "authority" to request the change.

Once need only look the output from a skip trace service to see how many people with similar names get cross-referenced in such reports. Those are the future victims of the debt collectors' no-holds-barred attempts to contact debtors.

I have a degree in engineering with 30 years of experience in databases and computer communications technology. I have served as a expert in computer databases and related communication technology in over 150 court cases. My experiences has shown that rather than code a number as a wrong number, when they actually concede they have a wrong number, debt collectors will "remove" it from their dialing systems.[5] This is not the proper way to handle such data, because when they acquire numbers from skip tracing "lost" debtors, that same wrong number will find its way back into the debtor's file. Wash, rinse, repeat.

Debtors may not "like" calling actual wrong numbers. But they dislike the inability to make calls looking for debtors even more. The latter greatly outweighs any incentive to minimize the former.

Reply comments of the American Bankers Association and Consumer Bankers Association

In their reply comments, the American Bankers Association and Consumer Bankers Association ("ABA/CBA") rely on a snippet of legislative history that they claim supports their argument. What they do not say, however, is that the text of the bill under consideration at that time, was vastly different from what Congress actually passed with respect to calls to cell phones. There was no mention in the bill of a restriction on calls for which the recipient is charged. The prohibition on calls to cell phones in that bill was much weaker than what became law in the TCPA as passed. The bill that was the subject of the report only proscribed "unsolicited" calls

[5] See Reply Comments of PRA, at 2.

to cell phones, which would be a closer fit to the commentary text quoted by ABA/CBA. But what passed into law was a much more restrictive requirement of ***express*** consent. As noted in my opening comments on this Petition, "express" is a very high standard as must be set forth in words and cannot be "implied." A restriction on merely "unsolicited" calls to cell phones allows for consent to permit such calls to be implied—such as by providing a phone number at which to be contacted within a business relationship.

Calls and text messages to cell phones for which the recipient is charged are prohibited, and the Commission lacks authority to create an exemption to that black letter provision.

Comments of GroupMe

Some of GroupMe's comments are comical in their naivete. The claim that "[t]he proposed definition [of ATDS] would neither disturb the Commission's 2003 TCPA Report and Order nor would it undermine the 2008 Declaratory Ruling concerning predictive dialers" is farcical. It would entirely exempt text messaging from coverage under the TCPA. It would exempt predictive dialers from the TCPA.

GroupMe claims that "by providing recipients of a GroupMe creator's group with the ability to opt-out, GroupMe provides a valuable service to recipients of group text messages."[6] This is analogous to a pickpocket who just stole $0.20 cents from your pocket, telling you that for another $0.20, he will provide a "valuable

[6] Comments of GroupMe at 6.

service" by telling you how to stop him from stealing more money out of your pocket without your consent.

First Amendment

GroupMe, for the first time, raises in its comments (not in its Petition) a challenge to the TCPA and the Commission's prior Orders on First Amendment grounds. The Commission should refuse to consider such sandbagging as it is not within the scope of the Petition or request for comments.

If the tardy First Amendment argument is addressed, it must be rejected.

First, the Commission can not discriminate against commercial speech "just because it can" by applying a law only to commercial speech and exempting non-commercial speech. There must be a nexus justifying the disparate treatment. In this case, there is no such difference in the harms from unsolicited text messages—the harms are the same for commercial and noncommercial messages—because the harm comes from the method of delivery and not from the content of the message. That is why the statute applies to *all* automated calls that are made to a cell phone, and not just solicitations. One need only consider *Kovacs v. Cooper* to understand the principle that it is the method, not the message, that subjects the text message sender to the TCPA.

GroupMe's attempt to analogize cell phone text messages to junk faxes is fatally flawed. An important purpose of the restriction on automated calls to cell phones is the invasion of personal privacy of individuals. The same with the restrictions of calls into the home. These are first and foremost invasions of

personal privacy. The legislative history is replete with that specific justification. The statute imposes a privacy prong on the Commission's consideration of exemptions of prerecorded calls into the home.[7] The legislative history for junk faxes was principally concerned with the interference with commerce and consumption of limited resources. Privacy was not a significant consideration for junk faxes sent to businesses.[8]

But the most glaring error in GroupMe's comments is "assum[ing] that the substantial government interest the ATDS provision is meant to promote is unsolicited commercial text messages, the ATDS provision as applied to GroupMe still fails."[9] Such an assumption is wrong. This is the same fatal misunderstanding of the TCPA that entities like GroupMe have been making for years. Some portions of the TCPA apply only to solicitations. **Other portions of the TCPA expressly apply to all calls and messages, regardless of whether they are solicitations or not**. The latter concept seems lost on GroupMe and its supporters. Indeed, GroupMe's assumption stated above is flatly wrong because the government interest in autodialed calls to cell phones has nothing to do with any "commercial nature" of those calls. The government interests are the invasion of privacy, the non-

[7] 47 U.S.C. § b(2)(C).

[8] This does not mean that such faxes are not an invasion of privacy, even to businesses, just that such an invasion of privacy was not a principle justification of the TCPA's proscriptions of junk faxes.

[9] Comments of GroupMe at 12.

consensual hijacking of the recipient's equipment, and the cost-shifting of the message to the recipient.

Unique aspects of unsolicited text messages

Unsolicited text messages are a special invasion of personal privacy specifically because they invade the recipient's personal space, trespass on personal property, and do so in some of the most personal places where people take cell phones—places they don't take fax machines. This clearly illustrates why Congress applied the ban on the use of automated devices to call cell phones, *regardless* of the content of the messages.

Text messaging presents a unique delivery mechanism—it uses the recipient's device, minutes, connectivity, and all without permission. It shifts the cost of paying for the receipt of the message to the recipients without their consent.[10] It is an instantaneous interruption of the consumer carrying the phone. These unique aspects of this delivery mechanism require that automated devices using this medium must be carefully scrutinized:

> The uniqueness of each medium of expression has been a frequent refrain: *See*, *e.g.*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First

[10] The only other methods of communications with similar attributes are telemarketing calls with the charges reversed; junk faxes where the recipient pays to receive the message (both of which are also proscribed by the TCPA), and unsolicited e-mail spam (already prohibited by many states and the CAN-SPAM Act).

One may think of television and radio as mediums where the sender has such control over what material comes out of the box, but in actuality, the recipient voluntarily consents to receipt of the television and radio programming (and the advertisements therein) by tuning in to that station. A more proper analogy would be if television or radio stations could reach out and turn on your receiver without consent, and change the channel to one of their choosing - not yours.

> Amendment purposes by standards suited to it, for each may present its own problems"); *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) ("We have long recognized that each medium of expression presents special First Amendment problems"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) ("Each method tends to present its own peculiar problems").

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981). "[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation, since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640, 650-51 (1981).

Text messaging couples speech activities (the content of the message) with non-speech activities (use of the recipient's property, invasion of privacy, and consumption of the recipient's resources without consent).

Unsolicited text messages to cell phones are not protected by the First Amendment.

One point raised by GroupMe is correct – *Central Hudson* is the wrong standard. Before any First Amendment test can be applied, one must first determine that the activity being regulated is in fact protected by the First Amendment. "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). The burden to prove that conduct genuinely protected by the Constitution is at issue, is on the party wishing

to engage in that conduct. *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 293, note 5 (1984); *Walker v. City of Kansas City, Mo.*, 911 F.2d 80, 85 (8th Cir. 1990).

One can not examine any regulation of *conduct in that forum* that is claimed to inhibit free speech rights without first asking the threshold question of whether or not the *conduct in that forum* is actually protected by the First Amendment in the first place. The fact that speech or words are involved does not automatically invoke First Amendment scrutiny. Picketing, almost by definition, contains protected speech, yet it has been long established that picketing on private property without the property owner's permission is not subject to First Amendment protection. "[U]nder the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this." *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (trespass on private property for picketing purposes is not subject to First Amendment protection). Consider if someone erected a billboard on your private property, or painted their advertisement on the side of your vehicle without permission. The ***contents*** of the messages distributed by such activities clearly involve protected speech, yet it is incomprehensible that someone could claim that trespass and graffiti laws unconstitutionally inhibit those acts. Imagine if a salesman on the street corner could reach into your pocket without consent, take ten cents to subsidize his printing cost, then hand you his sales flyer and run . . . and expect the First Amendment to protect his conduct.

When an unsolicited text message is sent, the sender is publishing their message using recipient's resources on the recipient's printing presses . . . and doing so without the recipient's consent. Under the TCPA, a speaker is in no way restricted from publishing their speech on their own resources and on their own printing press. There is no restriction of speech here—only a restriction of tortious conduct.

The TCPA is not a regulation of speech

As a threshold matter, the TCPA's restriction of unsolicited text messages or ATDS use is no more a regulation of speech than a graffiti or trespassing statute. It proscribes a class of non-consensual invasion of privacy, conversion, and trespass of another person's property. The burden is not to get the recipient's prior express consent to be exposed to the content of the message—the obligation is for the speaker to get consent to use someone else's resources and equipment to deliver the sender's cost-shifted message. It is a regulation of ***conduct***, not ***speech***. It applies to private property, not a public forum.[11] A restaurant owner does not have a First Amendment right to walk into a Kinko's copy shop, make a copy of the restaurant's advertisement on Kinko's copy machine and paper without paying for it, then hand

[11] While the "non-public" forum cases have mostly concerned restrictions on government owned forums that are non-public (*See*, *e.g.*, *Greer v. Spock*, 424 U.S. 828 (1976) (prohibiting political speeches or the distribution of leaflets in areas of government property otherwise open to the general public)), various courts have applied it to non-government owned property as well. *See*, *e.g.*, *State v. Migliorino*, 442 N.W.2d 36 (Wis. 1989) *cert. denied sub nom*. 493 U.S. 1004 (1989) (private medical facility was a nonpublic forum for First Amendment analysis purposes.) As many cases have noted, "the forum counts" in speech cases. "Furthermore, consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron*, 452 U.S. at 651. What is an impermissible restriction in a traditional public forum long used for public discourse such as the sidewalks and parks, can on the other hand be a perfectly permissible restriction in a non-public forum.

the advertisement to a Kinko's employee and ask them to come to the restaurant to buy lunch. Yet this is precisely what happens with unsolicited text messages to the same copy shop. It is equivalent to a telemarketing call with the charges reversed, or "getting junk mail with the postage due" — except that you have no chance to decline the charges. *Telemarketing Practices: Hearings on H.R. 628, 2131, and 2184 Before the Subcomm. On Telecommunications and Finance of the House Comm. On Energy and Commerce*, 101''st Cong. 1''st Sess. at 20 (1989) at 2 (hereinafter "*House Subcomm. Hrg. on Telemarketing Practices*") at 5 (Rep. Markey). "The Court never intimated that the visitor could insert a foot in the door and insist on a hearing." *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (upholding prohibition on use of sound trucks as delivery method of protected speech).

There is no First Amendment right to access private property to engage in speech.

Even a cursory review of case law shows emphatically that there is simply no First Amendment right to access another person's private property. *Hudgens v. NLRB*, 424 U.S. 507 (1976) (trespass not protected by First Amendment); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972) ("[T]his Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.")

There simply is no federal constitutional "right" to use another person's property for speech without consent. For example in *State v. Nye*, 943 P.2d 96 (Mont. 1997), the Supreme Court of Montana considered a case where a man claimed a

"free speech" right to put bumper stickers on other peoples' private property—without the consent of the owners:

> Nye points out that many others in the Gardiner community have similar stickers affixed to their vehicles or in their windows as a protest against what they perceive to be objectionable practices of CUT. However, Nye fails to recognize that the difference between his conduct and that of others in the Gardiner community is that the others he refers to placed the stickers on their own property while Nye placed the stickers on other people's property without their permission. As the State asserts in its brief, if Nye had limited his attack on CUT to the display of a bumper sticker on his car or living room window, the First Amendment would have protected his right to do so. Nye lost his First Amendment protection when he coupled the message on the bumper sticker with defacement of the property of others.

Id.', at 101. The ***contents*** of Nye's bumper stickers were fully protected by the First Amendment as the above quotation shows. But the non-consensual use of other peoples' bumpers to publish his message was ***not*** protected by the Fist Amendment. *See*, *also*, *N.O.W. v. Operation Rescue*, 37 F. 3d 646, 655 (D.C. Cir. 1994) ("Appellants have no general First Amendment right to trespass on private property."); *Cincinnati v. Thompson*, 643 N.E.2d 1157(Ohio App. 1994) (protesters not entitled to First Amendment protection for protesting on private property). "Under the present state of the law, freedom of speech does not entitle one to come upon the property of another and commit a trespass..." *Hood v. Stafford*, 378 S.W.2d 766, 772 (Tenn. 1964) (upholding ordinance that prohibited use of business property without consent for speech purposes). "[I]t is untenable that conduct such as vandalism is protected by the First Amendment merely because those engaged in such conduct intend thereby to express an idea." *In re Michael M.*, 86 Cal. App. 4th 718, 729 (2001) citing *Texas v.*

Johnson, 491 U.S. 397, 404 (1989). "The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another person's home or office." *Dietmann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

Nor does the "ease of use" or pervasiveness of the text messaging medium confer constitutional protection. "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron*, 452 U.S. at 647. "That more people may be more easily and cheaply reached . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open." *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949). "There is simply no First Amendment right to trespass upon private property, even when access to that property may be the only, or most effective, way to reach the intended audience." *Pro-Choice Network of W. N.Y. v. Project Rescue W. N.Y.*, 799 F.Supp. 1417, 1434 (W.D.N.Y. 1992) *aff'd in relevant part, & rev'd in part, sub nom.*, 519 U.S. 357 (1997).

Like Nye, text messengers lose any First Amendment protection for their content when they steal and trespass without permission to subsidize their distribution mechanism. "To permit the thief to thus misuse the [First] Amendment would be to prostitute the salutary purposes of the First Amendment." *United States v. Morrison*, 844 F.2d 1057, 1069-70 (4th Cir. 1988) (no right to steal information even for speech purposes). A thief or trespasser can not excuse his trespass by

espousing political discourse while he steals or trespasses. "An armed robber cannot escape responsibility for his or her conduct by pointing out that 'stick 'em up' is speech or by reciting the Gettysburg address during the robbery." *Huffman and Wright Logging Co. v. Wade*, 857 P.2d 101, 108, n. 9 (Or. 1993) (en banc).

Unsolicited messaging is a combination of speech and nonspeech activities. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 702-3 (1986). Tying up the recipients' resources and the shifting of costs to the unwilling recipients are "nonspeech elements" of the practice of nonconsensual text messaging. The TCPA is a proper step by a government which has protection of individual property rights as one of its compelling duties. It is these nonspeech elements that are the evils the statute addresses—not the speech itself. "[L]aw must reflect the 'differing natures, values, abuses and dangers' of each method [of communication]." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (regulation of billboards allowed because of unique harms caused by billboards, such as visual clutter, not manifest by other forms of advertising).

THE TCPA'S ATDS PROVISION IS CONTENT NEUTRAL

The ATDS restrictions of the TCPA, as interpreted by the Commission, easily meets the test for content neutrality

The Court has recently reiterated the test for content neutrality:

> As we explained in *Ward*': "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."

Hill v. Colorado, 503 U.S. 730, 719 (2000) citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "The correct rule, rather, is captured in the formulation that a restriction is content based only if it is imposed because of the content of the speech and not because of ***offensive behavior identified with its delivery.***" *Id.*, at 737 (citation omitted) (emphasis added) (Souter, O'Connor, Ginsberg, Breyer, JJ, concurring). This amply demonstrates that GroupMe was correct on one important point — *Central Hudson* is the wrong standard to apply to the ATDS restrictions. Assuming the First Amendment applies at all, the correct standard is the time, place, and manner restriction as set out in *Hill.*

Other courts have noted that *Hill* articulates a clarified standard for content neutrality. In *Thorburn v. Austin*, 231 F.3d 1114 (8th Cir. 2000), the court addressed the question of content neutrality of a picketing ordinance. A prior ordinance was held to be content-based "because it was impossible to tell whether a person was engaged in picketing without analyzing his message, we held that the limitation was not justified without reference to content." *Id.*, at 1118. The Eighth Circuit then recognized that "*Hill* ['v. Colorado] rejected this sort of analysis." *Id.* As a result, the ordinance in *Thorburn* was found to be content-neutral, even though prior to *Hill* it would have been held to be content-based. "Thus, the essence of time, place, or

manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980).

The unsolicited text message "method of speech" fits that description. Said more directly:

> The essence of time, place, and manner restrictions is content neutrality. The disregard of content is why such restrictions are given more deferential review than are other speech restraints. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 928, 89 L. Ed. 2d 29 (1986). ***Their intent is not to influence what a speaker has to say, only when, where, or how he says it.*** Their focus is on the effects of the act of speaking, not on the information conveyed by the speech. *Id.* at 930. In one sense, the restrictions in question do not regulate the content of appellant's solicitation -- it may make any sales pitch it pleases -- they merely dictate where and how appellant may make its pitch.

Nat'l Funeral Svcs., Inc. v. Rockerfeller, 870 F.2d 136, 145 (4th Cir. 1989) *cert. denied* 493 U.S. 966 (1989) (emphasis added).

Furthermore, Congress expressly intended the TCPA as regulation of the "means used to deliver the message" and not the content:

> The bill I am introducing today falls well within the scope of the first amendment. The first amendment allows the government every right to place reasonable time, place and manner restrictions on speech when 'necessary to protect consumers from a nuisance and an invasion of their privacy. . . . ***The bill does not ban the message; it bans the means used to deliver that message.***

137 Cong. Rec. S9840 (daily ed. July 11, 1991) (statement of Sen. Hollings) (emphasis added).

The offensive cost-shifted delivery mechanism is the evil addressed by the TCPA, and thus it is a content-neutral purpose.'[12] Congress received testimony that the "vehemence" of shoving their message into your own equipment using your own resources without permission is clearly vexing. *House Subcomm. Hrg. on Telemarketing Practices* at 97-8 (direct testimony of Prof. Ellis); *Id.*, at 82 (direct testimony of John M. Glynn, Maryland People's Counsel, that "[J]unk fax not only interferes with the use of your fax machine but makes you pay for it, which adds insult to injury.") There is no indication that Congress enacted the TCPA because of any "disagreement with the message" any speaker is making, nor does the record indicate anyone has even alleged such a motive. It is thus content-neutral under the *Ward / Hill* analysis.[13]

The flaw in many cases that examined the First Amendment application to the TCPA, was that the parties bypassed the necessary step of deciding what standard to apply, and leapt headfirst into a *Central Hudson* analysis. This wrong-footed start began with *Destination Ventures Ltd. v. FCC*, 844 F.Supp. 632, 635 (D. Or. 1994):

---

[12] Indeed, the term "content neutral" is shorthand for "content neutral ***purpose***" and not a "content neutral ***statute***." This is often lost on casual observers of First Amendment doctrines announced by the U.S. Supreme Court.

[13] One of the best tests for content-neutrality taught to law students, is the "language" test articulated by Professor John Hart Ely, "[h]ad his audience been unable to read English, there would have been no occasion for the regulation." John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1498 (1975) (discussing *Cohen v. California*, 403 U.S. 15 (1971)). This is what Professor Tribe calls "track two" analysis: is the regulation "aim[ed] at ideas or information?" *See*, *generally*, Lawrence Tribe, *American Constitutional Law: A Textbook*, MacMillan Publ., 5th Ed. 1995 at 791-92 (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949)). Even if the recipient of a text message does not speak English, their resources are still consumed for someone else's message, and their phone is used without consent and their personal privacy is invaded. The harms still exist.

> The parties agree that the restriction upon unsolicited fax advertisements is content-based, and that, as a restriction on commercial speech, the statute would pass constitutional muster if it directly advances a substantial governmental interest in a manner that is no more extensive than necessary to serve that interest.

That fateful decision by the litigants in *Destination Ventures* created a fiction that the TCPA is content-based, and must be analyzed under the elements of *Central Hudson*. However, the court did not make that determination—it was simply presupposed by the litigants.

One court that did not succumb to this rush to judgment, was the Arizona Court of Appeals in *Joffe v. Acacia Mortgage Corp.,* 121 P.3d. 831 (Ariz. Ct. App. 2005). That court correctly recognized the provisions of the TCPA at issue are content neutral, and thus subject to the less rigorous time, place, and manner standard.

The example of *Hill v. Colorado*

The fact that the TCPA applies to ATDS messages does not make the statute content-based. This is amply demonstrated by *Hill v. Colorado*. The statute in *Hill* only applied to, *inter alia*, speech containing "oral protest, education, or counseling." *Hill* 530 U.S. at 703 (citing Colorado Rev. Stat. §18-9-122(3)). The content of the speech thus determined whether the statute applied or not. But the Court held:

> It is common in the law to examine the content of a communication to determine the speaker's purpose. Whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, a copyright 'violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or

> written statement in order to determine whether a rule of law applies to a course of conduct.

Hill, 530 U.S. at 721. As explained by the Court in *Hill*, this type of statute is not content-based merely because the content of the message determines if it is subject to the statute or not. Only one other federal decision interpreting the TCPA has issued since the standards for content-neutrality were clarified in *Hill*. In a case brought by the Texas Attorney General, the district court for the Western District of Texas held the junk fax provision of the TCPA were "not a 'content-based' regulation for purposes of the First Amendment." *State of Texas v. Am. Blast Fax, Inc.*, 159 F. Supp. 2d 936 (W.D. Tex., 2001). This is true even though the statute only applies to advertising faxes. 47 U.S.C. § 227(b)(1)(c). The same conclusion is warranted here.

The TCPA addresses a "secondary effect" of an illegal delivery method.

While the TCPA is clearly content-neutral under the *Ward* / *Hill* analysis, another independent prong of content neutrality doctrine is the regulation of secondary-effects, meaning "regulations that apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech." *Boos v. Barry*, 485 U.S. 312, 320 (1988). The TCPA does not address any harm ***from the content*** of the message itself (such as offensive language in the message). The "regulatory target" is a harmful secondary effect—the electronic trespass into private property and non-consensual theft of resources. It is an unacceptable delivery method like the sound trucks in *Kovacs*. The Supreme Court has noted that

when addressing the secondary effects of conduct that is related to speech, it is not considered content-based regulation:

> In *Renton* [475 U.S. 41], the regulation explicitly treated "adult" movie theaters differently from other theaters, and defined "adult" theaters solely by reference to the content of their movies. 475 U.S., at 44. We nonetheless treated the zoning regulation as content neutral because the ordinance was aimed at the secondary effects of adult theaters, a justification unrelated to the content of the adult movies themselves. *Id.*, at 48.

Erie v. Pap's A. M., 529 U.S. 277, 295 (2000). "[W]hile the regulation in *Renton* applied only to a particular category of speech, its justification had nothing to do with that speech." *Boos*, 485 U.S. at 320. The actual content of the message is not the evil.

Elements of the "time, place, and manner" test

The most significant difference between the *Central Hudson* test and the time, place, and manner test, is that all prongs of the time, place, and manner test are subject to less rigorous "reasonable" scrutiny. "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Clark*, 468 U.S. at 293; "[G]overnment may impose reasonable restrictions on the time, place, or manner of protected speech." *Ward*, 491 U.S. at 791. Greater deference is given to judgments of the drafters when analyzing time, place, and manner restrictions. *Clark*, 468 U.S. at 299; *Metromedia*, 453 U.S. at 509 ("[We] hesitate to disagree with the accumulated, commonsense judgments of local lawmakers...").

The elements of permissible time, place, and manner restrictions are 1) content neutrality, 2) serving a significant government interest, 3) narrowly tailored, but not least restrictive means, and 4) leaving open ample opportunity for speech in alternative fora. Another often overlooked aspect of time, place, and manner tests is that the Court has adopted an implicit balancing approach. ("Particularized inquiry" in *Metromedia*, 453 U.S. at 503). With regard to a significant state interest, any review of the legislative history reveals that victims of the non-consensual use of their resources and equipment by unsolicited messages find it undisputedly vexatious and harassing. *See, e.g.*, *House Subcomm. Hrg. on Telemarketing Practices* at 97-8 (direct testimony of Prof. Ellis); *Id.*, at 82 (direct testimony of John M. Glynn). This easily satisfies the significant government interest prong of the time, place, and manner doctrine. "[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved ***less effectively absent the regulation.***" *Ward*, 491 U.S. at 799 (emphasis added).

Although alternatives can be considered, alternatives that are "less effective" simply don't count. What is required is "a 'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable." *Ward*, 491 U.S. at 797.

As for the TCPA's restrictions being reasonable, the Supreme Court pointed out in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37,

50-51 (1983), that a restriction on speech is "reasonable" when it is "consistent with the [state's] legitimate interest in preserving the property for the use to which it is lawfully dedicated." Preventing nonconsensual hijacking of the recipient's printing press, so it can be preserved for use by the owner and his invitees clearly fits this reasonableness test.

The alternative is eminently reasonable—simply get consent before sending cost-shifted bulk messages to peoples' cell phones.

CONCLUSION

There is a constitutional right to speak—not a constitutional right to use of someone else's printing press to print that speech at someone else's expense and shove it under the nose of the recipient in his most private place in his home. The issue of nonconsensual text messages should not be subsumed in heated discussions over how many pennies worth of resources are used, or the invocation of a theoretical Constitutional protection for consuming those pennies without consent. Such a fixation demonstrates a deception of "littles:"

> [T]he constant recurrence of small expenses in time eats up a fortune. The expense does not take place at once, and therefore is not observed; the mind is deceived, as in the fallacy which says that "if each part is little, then the whole is little." this is true in one way, but not in another, for the whole and the all are not little, although they are made up of littles.

Aristotle, *Politics*, Bk. 5, Ch. 8 (Jowett trans.) A man who steals a dollar from a million persons has stolen the same amount as a man who steals one million dollars from

one person. In the same way, unsolicited text messaging, even at pennies per message, when measured by the billions of those messages that can be sent each year, constitutes much more than a "little."

Respectfully submitted, this the 10th day of September, 2012.

/s/ Robert Biggerstaff